

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSE J. HERNANDEZ,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
NY07529110047

DATE: JUN 21 1991

Jose J. Hernandez, Guaynabo, Puerto Rico, pro se.

John C. Alberts, San Juan, Puerto Rico, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a timely petition for review from the February 20, 1991 initial decision that affirmed the agency's action in removing him from the PS-05 position of City Carrier. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

The agency removed the appellant based upon the charge of failure to meet the requirements of his position as set forth in Employee Labor Manual (ELM) 661.81. Appeal File (AF), Tab 3, Subtab 4b. That ELM provision requires that employees be regular in attendance. AF, Tab 3, Subtab 4j. In its proposal notice, the agency enumerated several instances of the appellant's alleged absences, and further alleged that the appellant failed to abide by items five (5) and ten (10) of an April 25, 1989 settlement agreement between the parties. AF, Tab 3, Subtab 4b. The referenced settlement agreement items provide:

5. Mr. Hernandez agrees to actively participate in the Employee Assistance Program and will authorize the EAP coordinator to submit monthly reports to management of his participation and progress in the program.

* * *

10. Mr. Hernandez agrees that he will otherwise conduct himself in accord with Postal Service rules and regulations, including rules and regulations related to complying with the orders of his administrative superiors.

AF, Tab 3, Subtab 4i.

The settlement agreement also contains the following provision:

11. Mr. Hernandez agrees that he will be in a probationary status for a period of 24 months beginning on the date of his being returned to a paid duty status, and that should he fail to conduct himself in accord with paragraph 10 above, he will be subject to dismissal under the Postal Service's

rules and regulations and that he waives any right to file a grievance under the applicable collective bargaining agreement, or to seek relief from such action by way of any administrative or judicial appeal or claim.

Id. (emphasis supplied).

Neither party to the instant appeal addressed the issue of whether paragraph 11 precluded the Board from assuming jurisdiction over the appellant's removal. The administrative judge raised the jurisdictional issue sua sponte, however, and determined that the appellant was not barred from bringing this appeal, because he had not signed the settlement agreement. Initial Decision (ID) at 2-5. The administrative judge then found the agency's charge supported, and the appellant's affirmative defenses of harmful error and handicap discrimination not supported, by the requisite degree of evidence, and he affirmed the removal action.

The appellant now asserts, in his petition for review, that the administrative judge erred by not sustaining his claim of handicap discrimination.

ANALYSIS

Initially, we note that the administrative judge erred by finding that the appellant had not signed the April 25, 1989 settlement agreement. He did sign it, on a line just above his typed name and position, and beneath an acknowledgment statement that provided, "I hereby state that I have read and

understood the above Settlement Agreement and I agree with language contained therein." AF, Tab 3, Subtab 4i.

Moreover, the appellant's union representative signed the agreement on his behalf, which, in the absence of the appellant's own signature, would have sufficed to bind the appellant to the terms of the agreement. See, e.g., *Walker v. Department of the Navy*, 40 M.S.P.R. 600, 603 n.2 (1989). We also note that the appellant has not claimed that he did not freely enter into the settlement agreement. See *Stewart v. U.S. Postal Service*, 926 F.2d 1146, 1148 (Fed. Cir. 1991). We find, therefore, that the appellant is bound by the terms of the April 25, 1989 agreement. *Id.*

In *Stewart*, the court considered a similar "last chance" settlement agreement provision, in which the employee waived his right to appeal to the Board "in the event [that he] violated any of the agreement's provisions and the agency reimposed his removal." *Id.*, 926 F.2d at 1147. The agency had removed Stewart and he had appealed to the Board, claiming that he had not violated any of the agreement's provisions. The court held that the Board erred by dismissing Stewart's appeal on the basis of the waiver provision, without first deciding the threshold issue of whether he had breached the agreement. *Id.*, 926 F.2d at 1148-49.

In this case, as in *Stewart*, the "last chance agreement predicates the reimposition of removal and concomitant waiver

of appeal rights on breach of one or more of the other stipulations the agreement contains." *Id.*, 926 F.2d at 1148. The administrative judge found that the agency herein demonstrated, by a preponderance of the evidence, that the appellant was absent on the charged dates. He also found that, but for 8 hours of scheduled leave, the appellant's absences were unscheduled, and that the appellant was on notice that the continued unscheduled nature of his absences could result in discipline.

The administrative judge concluded, from the above, that the appellant had failed to meet the requirements of his position, and was in violation of section 661.81 of the ELM. ID at 3-4. We agree, based on our own review of the record. Further, we find that this conclusion suffices as a finding that the appellant breached paragraph 10 of the settlement agreement, which requires that he "conduct himself in accord with Postal Service rules and regulations." AF, Tab 3, Subtab 4i.* Therefore, under the specific waiver provision of

* In *Stewart*, the court remanded the appeal to the Board, upon finding that the employee had made a non-frivolous allegation that he had not violated the agency's emergency absence regulation, but, rather, had complied or made good faith efforts to comply with it. *Stewart*, 926 F.2d at 1148-49. In the instant appeal, the appellant alleged, inter alia, that the agency's action in charging him with the specified absences was wrong because he had provided medical certificates that justified his absences. AF, Tab 1. We need not decide whether this appellant's assertions on appeal constituted a "non-frivolous factual issue of compliance with a last chance agreement," as did *Stewart's*, *Stewart*, 926 F.2d at 1148, because the administrative judge's examination into the merits of the agency's action, which we have adopted herein, satisfies the mandate in *Stewart*, regardless.

paragraph 11 of the settlement agreement, *id.*, the Board lacks jurisdiction over this appeal. See *Stewart*, 926 F.2d at 1148; *McCall v. U.S. Postal Service*, 839 F.2d 664, 666-67 (Fed. Cir. 1988).

Accordingly, the appeal must be dismissed. Moreover, since the appellant waived his right to appeal the removal action, the Board lacks jurisdiction over his claim of handicap discrimination. See *Cruz v. Department of the Navy*, No. 89-3359, slip op. at 13-14 (Fed. Cir. Apr. 30, 1991) (in the absence of an appealable action, the Board lacks jurisdiction to consider a claim of reprisal for filing EEO complaints). His petition for review on that issue, therefore, does not meet the criteria for review.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

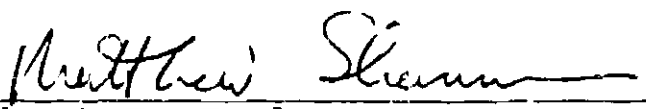
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

Moreover, since paragraph 11 of the agreement is operable in the event that the appellant violates paragraph 10, it is irrelevant to this proceeding whether the appellant violated paragraph 5 of the agreement, as the agency also charged in its proposal notice. See AF, Tab 3, Subtabs 4b, 4i.

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


for Robert E. Taylor
Clerk of the Board

Washington, D.C.